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IN THE

Supreme Court of the United States

October Term, 1932.

No. 634

DAVID DAUBE,

Petitioner.

v.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

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JOHN E. HUGHES and WILLIAM COGGER, in behalf of DAVID DAUBE, pray that a writ of certiorari issue to review the judgment of the Court of Claims of the United States.

JURISDICTION.

The original opinion of the Court of Claims is published in *59 F. (2d) 842*, and was rendered July 5, 1932. A motion for a new trial was filed and was overruled in a supplemental opinion rendered November 14, 1932, and which is published in *1 F. Supp. 771*.

QUESTIONS PRESENTED.

1. Is the petitioner barred from recovering an overpayment of tax allowed him by the Commissioner of Internal Revenue for the year 1919 and credited to an outlawed tax due from a partnership of which petitioner was a member without authority from petitioner, merely because petitioner did not file a claim for the refund of said overpayment for the reason that it was allowed by the Commissioner of Internal Revenue before the time for filing a claim for its refund had expired?

2. Is the petitioner precluded from recovering an overpayment allowed him by the Commissioner of Internal Revenue for the year 1918 (for which overpayment petitioner filed a timely claim for refund) which was credited to outlawed taxes due from a partnership of which petitioner was a member because petitioner had agreed in writing prior to the running of the Statute of Limitations that it might be credited to the partnership taxes, *but did not agree in said agreement that this might be done after the collection of said taxes was barred?*

STATEMENT.

The findings of fact made by the Court of Claims show that for the year 1919 petitioner was duly and regularly and before the Statute of Limitations for filing a claim for its refund had expired, allowed an overpayment of $2,628.26 income taxes for the year 1919. Without authority from the petitioner the Commissioner of Internal Revenue credited this overpayment against an outlawed tax due from a partnership of which petitioner was a member. Within six years from the allowance of said overpayment petitioner brought this suit against the United States to recover said overpayment and the Court of Claims denied recovery solely because petitioner did not file a claim for the refund of said $2,628.26 within five

years from the time his 1919 return was due. The Commissioner of Internal Revenue had, however, allowed it on March 29, 1924, and five years from the time the petitioner's 1919 return was due did not expire until March 15, 1925. For the year 1918 the Commissioner of Internal Revenue duly and seasonably allowed and the petitioner filed a proper and timely claim for the refund of an overpayment of $10,874.64. It will not be disputed, and the Court of Claims correctly held, that this was credited to outlawed taxes due from a partnership for 1918 of which petitioner was a member. These partnership taxes became outlawed April 1, 1924. The Commissioner signed the second schedule allowing the overpayment on March 29, 1924, and the credit was directed to be made by letter dated July 28, 1924, and actually made some time after that date. (This letter is contained in the record at page 42 and it shows that a Treasury Department check had actually issued and been sent to the Collector payable to the petitioner in the sum of $13,502.90, which was the total of the 1918 and 1919 overpayments.) The Court of Claims held that the petitioner could not recover the 1918 overpayment on the alleged ground that he had authorized its credit to the partnership taxes by a written agreement. This agreement is set forth in the record at pages 38 to 41 and is dated February 23, 1924 (more than a month before the Statute of Limitations would expire). It does not authorize this credit to be made after the Statute of Limitations had outlawed or extinguished the partnership tax and it contains the following provision:

> "The members of said partnership have each prepared and filed herewith separate claims on Form 843 for the refunding of the net amount refundable to each of said members by reason of the overpayment of 1918 taxes, which is respectfully requested be allowed in full for the net amount refundable to each individual member of said partnership if it is held

that the Commissioner of Internal Revenue cannot lawfully credit such amounts against the additional tax assessed against said partnership for the year 1917 in the manner and for the purposes heretofore set forth, otherwise the claims for refund to remain in full force and effect."

STATUTES INVOLVED.

The following are the provisions of law applicable to the questions presented in this case:

Revenue Act of 1928.

"Section 609. *Erroneous Credits.*

"(a) *Credit Against Barred Deficiency.*—Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under section 607.

* * *

"(c) *Application Of Section.*—The provisions of this section shall apply to any credit made before or after the enactment of this Act."

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Claims erred (1) in holding that the petitioner could not recover for 1919 because he did not file a refund claim for said year notwithstanding the overpayment had been duly and timely allowed by the Commissioner, and (2) in holding that the petitioner could not recover the 1918 overpayment because of the written agreement.

REASONS FOR GRANTING THE WRIT.

1. With respect to the year 1919 the decision in the present case denying recovery on the ground that a timely refund claim was not filed, is in conflict with the decision of the United States Circuit Court of Appeals for the Third Circuit in the case of *Wm. J. Friday & Co., Inc., v.*

United States, decided September 19, 1932, but not published in the Federal Reporter to date.

2. The second reason for granting the writ is that Judge Littleton is right when he states in his dissenting opinion in the case at bar, *59 F. (2d) 842, at page 850*, as follows:

> "In so far as concerns the Commissioner's allowance of the amounts involved and the nature of the plaintiff's cause of action, as stated in his petition, I can see no essential difference between this case and the case of *Bonwit Teller & Co. v. United States, 283 U. S. 258.*"

3. With reference to the year 1918, there is nothing in the agreement relied upon by the Court of Claims which authorized the Commissioner to credit the overpayment to taxes due from the partnership after their collection became outlawed. The agreement was made before the collection of these taxes was outlawed and the Commissioner had time before they became outlawed to make this credit but did not do so until afterwards. Furthermore, the agreement reserves the right to recover an unlawful credit in the extract therefrom quoted on page 4 of this petition.

4. Furthermore, the opinion of the Court of Claims gives an effect to this agreement which Congress after mature consideration deliberately refused to give, as is fully demonstrated in the brief in support of this petition.

Wherefore, it is submitted that this petition should be granted.

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BRIEF IN SUPPORT OF PETITION.

The reason why this writ should be allowed to review the judgment against the plaintiff with respect to the overpayment made by him for the year 1919 is fully set forth in the dissenting opinion of Judge Littleton. *(59 F. (2d) 842.)* (This record pages 27 to 36.) Petitioner submits this dissenting opinion to this Court as his brief in support of this petition. It is further submitted that this dissenting opinion is the result of years of experience in the administration of the Tax Law and years of consideration of the decisions of this Court and it is manifestly correct. To that opinion petitioner has only to add that the majority opinion in the case at bar as to the 1919 overpayment is squarely in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in the *Friday case, supra.*

For the year 1918 recovery is denied solely on account of the agreement. This agreement is published in the record at pages 38 to 41, and if this Court upon reading the same can see anything in it which expressly allows the Commissioner to make a credit of the 1918 overpayment due the petitioner, to partnership taxes *after the said taxes have become outlawed*, then this writ should be denied. Otherwise it should be allowed. If the respondent can point out anything in the agreement to this effect, it ought to do so and some meaning should be attached to the provision in the agreement quoted on page 3 of this petition.

THE OPINION OF THE COURT OF CLAIMS GIVES AN EFFECT TO THIS AGREEMENT AND READS AN EXCEPTION INTO SECTION 609 OF THE REVENUE ACT OF 1928 WHICH CONGRESS AFTER MATURE CONSIDERATION DELIBERATELY REFUSED TO ENACT.

When the Revenue Act of 1932 was pending in Congress the Treasury Department, knowing that the case at bar and similar cases were pending in Courts, made an attempt to have Congress take them out of the operation of *Section 609 of the Revenue Act of 1928* and prevent the refund by legislation. The Department had (we submit correctly) held in *G. C. M. 6296*, published in *C. B. VIII-2, at page 152*, that a claim for credit was not within the scope of *Section 611 of the Revenue Act of 1928* and did not take the case out of the operation of *Section 607*, providing for the refund of all taxes paid after the Statute of Limitations had run. It attempted to have the case at bar, credit claim cases and similar cases covered by legislation.

When the Revenue Act of 1932, approved June 6, 1932, was under consideration by the Finance Committe of the Senate, *section 1107*, entitled "Credits of overpayments," was inserted as *amendment 262*, as follows:

> "(a) If any internal-revenue tax was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim was filed, or a request in writing made, for a credit against the tax so assessed of an amount claimed as an overpayment of internal-revenue tax, and if collection of any part of the tax so assessed was postponed, then (1) a credit (made prior to May 29, 1928) against the tax so assessed shall not be considered as void under the provisions of *section 609 (a) of the revenue act*

of 1928, relating to erroneous credits, and (2) the payment (made prior to May 29, 1928) of the part of the tax the payment of which was so postponed shall not be considered as an overpayment under the provisions of *section 607 of the revenue act of 1928*, relating to payments made after the expiration of the period of limitation on assessment and collection.

"(b) As used in subsection (a), the term 'tax' includes any interest, penalty, additional amount, or addition to any internal-revenue tax."

When the bill passed the Senate containing the above-quoted provisions and went to conference it was strenuously opposed by taxpayers affected, including the taxpayer in the case at bar, and the attorneys of such taxpayers, with the result that the Senate Finance Committee struck it from the bill and the following comment was contained on its striking in *Conference Report No. 1492, at page 29:*

"This amendment provides that in certain cases where, by reason of the filing of a claim or request for credit, the collection of an assessed tax was postponed, any credit against the tax so assessed shall not be considered void and any payment of part of the tax, payment of which was so postponed, shall not be considered as an overpayment; and the Senate recedes."

CONCLUSION.

Certainly this Court ought to review the conflict between the decisions of the Circuit Court of Appeals and also ought to review a decision essentially contrary to the decision of this Court in the *Bonwit Teller case*, and further this Court ought not to permit the Court of Claims by judicial legislation to read an exception into the Revenue Act of 1928 which Congress after mature consideration deliberately refused to include therein.

For any one of the foregoing reasons this writ should be granted.

All of which is respectfully submitted,

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